

# CONSUMER SCOTLAND ACT 2020

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## EXPLANATORY NOTES

### THE ACT

#### *Overview*

#### **Part 3**

#### **Interpretation and final provisions**

##### *Section 24 – Meaning of “consumer”*

58. For the purposes of this legislation, a consumer is an individual, or a business no larger than a small business, that purchases, uses or receives goods or services in Scotland, where those goods or services are supplied in the course of a business.
59. Individuals are covered by this definition only where they are not purchasing, using or receiving the goods or services wholly or mainly in the course of a business carried on by the individual. This means that where an individual runs or works for a large business, the act of that person purchasing something for that large business is not swept into the definition of a consumer. However, subsection (1)(b) clarifies that individuals who are operating as sole traders can fall within the concept of small businesses.
60. In every case, a “consumer” is defined by reference to purchasing, using or receiving goods or services. It is therefore only where a small business is in essence the purchaser in a transaction that they are a “consumer”; not when they are acting as the seller or provider of goods or services. However, consumers are covered by the definition where they receive or are using goods or services in Scotland from a business regardless of whether or not those goods or services are paid for. The provision of services would include, for example, a disposal or recycling service.
61. Consumer is also defined to include potential consumers. This means, for example, that Consumer Scotland could investigate practices which deter would-be consumers from pursuing a transaction. A mail recipient is also included in the definition of a person who uses services.

##### *Section 25 – Interpretation*

62. As noted in relation to section 24, the goods or services purchased, used or received must be supplied in the course of a business if the individual or business is to be a consumer for the purposes of this legislation. A business is defined widely to include a not-for-profit enterprise which exists wholly or mainly to benefit society or a profession as well as the activities of any government department, local or public authority or other public body. The term “goods” is defined widely to include the purchase of land.
63. The term “consumer matters” is defined as meaning the interests of consumers and any matter connected with that.

64. The term “vulnerable consumers” is defined to mean consumers who, by reason of their circumstances or characteristics may have significantly fewer or less favourable options as consumers than a typical consumer, or are otherwise at a significantly greater risk of harm to their interests as consumers, or to the harm that is caused being more substantial, than would be the case for a typical consumer. A person may be a vulnerable consumer when circumstances cause that person to have fewer options, or to be more at risk of harm, than a typical consumer – for example by virtue of age, mental or physical health, economic circumstances, geography, caring responsibilities, or because of a bereavement. The characteristics or circumstances which may result in a person being a vulnerable consumer may be short-term, long-term or permanent. The definition makes it clear that this is a matter which is likely to fluctuate and the question of whether someone is vulnerable will depend on the particular circumstances and context they find themselves in at a particular time.

### ***Section 26 – Regulations***

65. Section 26 relates to the provisions in the Act which confer power on the Scottish Ministers to make regulations. Subsection (1) provides that these powers include the power to make different provision for different purposes. It also allows the making of incidental, supplementary, consequential, transitional, transitory or saving provision.
66. Subsections (2), (3) and (4) make provision about the parliamentary procedure which applies to different sets of regulations (for more details of which, see sections 28 and 29 of the Interpretation and Legislative Reform (Scotland) Act 2010). This section does not apply to the commencement regulations required to bring parts of the Act into force.

### ***Section 27 – Ancillary provision***

67. This section enables the Scottish Ministers, by regulations, to make incidental, supplementary, consequential, transitional, transitory or saving provision in connection with this legislation.

### ***Section 28 – Amendment of public bodies legislation***

68. This section introduces schedule 2. For commentary on schedule 2, see paragraphs 93 to 114 of these Notes.

### ***Section 29 – Commencement***

69. This section provides that, other than this section and sections 25 (interpretation), 26 (regulations), 27 (ancillary provision) and 30 (short title), which come into force the day after Royal Assent, the Scottish Ministers will specify the day on which the provisions in this Act come into force through regulations.

### ***Section 30 – Short Title***

70. This section provides that the short title of this Act is the Consumer Scotland Act 2020.

## ***Schedule 1 – Consumer Scotland (status, membership, procedures and powers)***

### **Status**

71. Paragraph 1 of schedule 1 provides that Consumer Scotland is not an emanation of the Crown. The Crown, which for this purpose broadly means the executive branch of government, enjoys certain privileges and immunities in law. Consumer Scotland is not to be regarded as a government body and therefore none of the particular legal rules that apply to government bodies apply to Consumer Scotland.
72. Consumer Scotland is expected to have the status of an office-holder in the Scottish Administration, within the meaning of section 126(7) of the Scotland Act 1998, by

virtue of an order under that Act. As a result of this, sections 19, 21 and 22 of the Public Finance and Accountability (Scotland) Act 2000 will apply to Consumer Scotland, meaning that it must prepare, lay and arrange auditing of its accounts in line with that Act. In consequence, this Act does not make any provision in relation to Consumer Scotland's accounts.

### **Membership**

73. Paragraph 2 of schedule 1 sets rules around the membership of the board of Consumer Scotland.
74. Consumer Scotland must have a member who acts as a chair and at least two, but no more than four, additional members. The number of members allowed to form the board of Consumer Scotland can be changed through regulations made by the Scottish Ministers.
75. The Scottish Ministers must act in a way that encourages equal opportunities when appointing members to the board of Consumer Scotland. This is in addition to, and broader than, the rules which will apply under the Gender Representation on Public Boards (Scotland) Act 2018 (see the discussion below on paragraph 8 of schedule 2 of the Act).
76. In addition, when appointing members, the Scottish Ministers are required to have regard to the desirability of ensuring that the board has at least one member with either personal experience of, or knowledge of or experience dealing with, the difficulties faced by vulnerable consumers.
77. Members are to be appointed for a term of up five years and may be reappointed. The terms and conditions of appointment will be determined by the Scottish Ministers.

### **Persons who may not be members**

78. Paragraph 3 of schedule 1 disqualifies certain individuals from becoming members of Consumer Scotland.
79. In addition to these disqualification grounds, a person can also be disqualified from being a member by virtue of section 19(1)(e) of the Ethical Standards in Public Life etc. (Scotland) Act 2000. This provides that if a member of Consumer Scotland breaches the body's code of membership, the member can be removed as member of Consumer Scotland and disqualified from being a member for a maximum period of five years.

### **Early termination of membership**

80. Paragraph 4 of schedule 1 sets out the circumstances in which someone can cease to be a member of Consumer Scotland before the end of the person's period of appointment, namely:
  - a member can resign,
  - a person will automatically cease to be a member if the person becomes someone who is disqualified from being a member under paragraph 3 of schedule 1,
  - the Scottish Ministers may remove a member if the member is absent, without reasonable excuse, for 3 consecutive meetings of Consumer Scotland or if Ministers consider that a member is unable or unsuitable to continue as a member.
81. As noted above in relation to disqualification from membership, a person can also be removed by the Standards Commission for Scotland under section 19(1)(e) of the Ethical Standards in Public Life etc. (Scotland) Act 2000.

### **Members' remuneration, allowances and pensions**

82. Paragraph 5 of schedule 1 makes provision for Consumer Scotland to determine the remuneration of its members, and for the reimbursement of expenses incurred by those members in carrying out their functions. Similar provision is made in relation to the payment of pensions. Any such payments by Consumer Scotland are subject to the approval of the Scottish Ministers.
83. If someone ceases to be a member before the person's period of appointment has ended, the Scottish Ministers can (but do not need to) permit Consumer Scotland to pay that person a sum of money as compensation for the premature loss of office.

### **Chief executive and other staff**

84. Paragraph 6 of schedule 1 details that Consumer Scotland must, with the approval of the Scottish Ministers, appoint a chief executive (who cannot also be a member of the board). Consumer Scotland may also appoint other staff members but those appointments do not require Ministerial approval. Consumer Scotland is to set the terms and conditions of employment for the chief executive and other staff, subject to obtaining the Scottish Ministers' approval.
85. Provision is also made at paragraph 7 of schedule 1 for the payment of staff pensions. However, the power to pay staff salaries is not mentioned as it is implicit in the power to appoint staff; their remuneration will form part of the terms and conditions referred to in paragraph 6(5) on which they are appointed.

### **Committees**

86. Paragraph 8 of schedule 1 enables Consumer Scotland to create committees and sub-committees. A committee or sub-committee member may be an individual who is not a member of Consumer Scotland. Such individuals could attend and participate in committee meetings but would not be entitled to vote at those meetings.
87. This paragraph also makes provision for the remuneration of members of committees and sub-committees. There is an exception to this in paragraph 8(3)(a) and (b) where board members, and members of staff, of Consumer Scotland are also members of committees and/or sub-committees. However, this is not to prevent the remuneration of members, or members of staff, of Consumer Scotland; they can receive remuneration in their capacity as members or as staff.

### **Authority to perform functions**

88. Paragraph 9 of schedule 1 provides that Consumer Scotland may authorise any of its members, any of its committees or sub-committees, or any member of its staff to perform its functions to whatever extent Consumer Scotland determines. This enables Consumer Scotland to delegate functions for operational purposes. However, Consumer Scotland itself remains ultimately responsible for the performance of its statutory functions. In addition, Consumer Scotland may not authorise someone else to approve a budget, financial plan, annual report or accounts.

### **Regulation of procedure**

89. Paragraph 10 of schedule 1 provides that Consumer Scotland may regulate its own procedures, including the minimum number of members that need to be present to agree decisions and including the procedure of any committee or sub-committee.

### **Validity of things done**

90. Paragraph 11 of schedule 1 stipulates that a vacancy in the membership of Consumer Scotland, or a flaw in an appointment or the disqualification of a member after

appointment, does not render invalid any work carried out by Consumer Scotland in the meantime.

### **General powers**

91. Paragraph 12 of schedule 1 provides a wide general power for Consumer Scotland to do anything necessary to enable it to perform its duties and fulfil its remit. This could include, for example, entering into contracts, and acquiring and disposing of land.

### **Location of office**

92. Paragraph 13 of schedule 1 confirms that whilst Consumer Scotland can choose the location of its office, the decision is subject to the requirement to obtain approval from the Scottish Ministers.

### ***Schedule 2 - Application of public bodies' legislation***

93. Schedule 2 amends relevant public bodies' legislation so as to encompass Consumer Scotland.

### **Ethical Standards in Public Life etc. (Scotland) Act 2000**

94. Paragraph 1 of schedule 2 adds Consumer Scotland to the list of devolved public bodies in schedule 3 of the Ethical Standards in Public Life etc. (Scotland) Act 2000 ("the 2000 Act").
95. This means that Consumer Scotland will need to:
- have a code of conduct for its members, whose compliance with the code will be policed by the Standards Commission for Scotland (see sections 3 and 9 of the 2000 Act), and
  - maintain a public register of its members' interests (see section 7 of the 2000 Act).

### **Scottish Public Services Ombudsman Act 2002**

96. Paragraph 2 of schedule 2 adds Consumer Scotland to the list of authorities in schedule 2 of the Scottish Public Services Ombudsman Act 2002 ("the 2002 Act").
97. The effect of this is to:
- make the exercise of administrative functions by Consumer Scotland amenable to investigation by the ombudsman (see section 5 of the 2002 Act),
  - oblige Consumer Scotland to have its own complaints handling procedure that complies with the statement of principles published by the ombudsman under section 16A of the 2002 Act,
  - permit Consumer Scotland to be made subject to the requirement to have a complaints handling procedure that complies with a model complaints handling procedure prepared by the ombudsman (see sections 16B and 16C of the 2002 Act).

### **Freedom of Information (Scotland) Act 2002**

98. Paragraph 3 of schedule 2 adds Consumer Scotland to the list of Scottish public authorities in schedule 1 of the Freedom of Information (Scotland) Act 2002 ("the FOI (S) Act").
99. This means that Consumer Scotland will be subject to the requirements which the FOI (S) Act places on public bodies, including requirements to provide information to the public on request and to have in place a scheme under section 23 of that Act for the pro-active publication of information it holds.

100. Being a public authority within the meaning of the FOI (S) Act also makes Consumer Scotland a “Scottish public authority” to which the Environmental Information (Scotland) Regulations 2004 apply.
101. It also means that Consumer Scotland falls within the definition of a “public body” under section 44 of the Climate Change (Scotland) Act 2009. This means that it must act in a way calculated to contribute to the delivery of climate change targets and any climate change adaptation programme and in the way that it considers is most sustainable. It can also have further duties, including reporting duties, imposed upon it.
102. In addition, as a public authority within the meaning of the FOI (S) Act, Consumer Scotland is a “public authority” or “public body” for the purposes of the General Data Protection Regulation by virtue of section 7 of the Data Protection Act 2018 (subject to the power under that section to remove that status not being exercised). The General Data Protection Regulation (also commonly referred to by the acronym “GDPR”) is [Regulation \(EU\) 2016/679](#) of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. There are particular rules applied to bodies classified as “public authorities” (over and above those applied to all data processors) in the GDPR and the Data Protection Act 2018. An analysis of those rules is beyond the scope of these Notes.

### **Public Appointments and Public Bodies etc. (Scotland) Act 2003**

103. Paragraph 4 of schedule 2 adds Consumer Scotland to the list of specified authorities in schedule 2 of the Public Appointments and Public Bodies etc. (Scotland) Act 2003 (“the 2003 Act”).
104. This means that the Scottish Ministers, when appointing Consumer Scotland’s members, will need (under section 2 of the 2003 Act) to comply with the code of practice on public appointments produced by the Commissioner for Ethical Standards in Public Life in Scotland.

### **Public Services Reform (Scotland) Act 2010**

105. Paragraph 5(a) of schedule 2 adds Consumer Scotland to the list of bodies in schedule 5 of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”).
106. This means that Consumer Scotland is a body in relation to which an order can be made under section 14 of the 2010 Act where it would improve the exercise of public functions, having regard to efficiency, effectiveness or economy. An order under section 14 of the 2010 Act can (subject to restrictions, and only after the Scottish Parliament has approved a draft of the order):
  - modify, confer, abolish, transfer or provide for the delegation of any function of a public body,
  - amend the constitution of a public body.
107. Paragraph 5(b) of schedule 2 adds Consumer Scotland to the list of bodies in schedule 8 of the 2010 Act. This means that Consumer Scotland will be subject to the duties to report after each financial year on:
  - expenditure (see section 31 of the 2010 Act), and
  - the steps it has taken to promote and increase sustainable growth and improve its efficiency, effectiveness and economy (see section 32 of the 2010 Act).

### **Public Records (Scotland) Act 2011**

108. Paragraph 6 of schedule 2 makes Consumer Scotland subject to the duties created by the Public Records (Scotland) Act 2011 to produce, implement and keep under review a records management plan.

### **Procurement Reform (Scotland) Act 2014**

109. Paragraph 7 of schedule 2 makes Consumer Scotland subject to the procurement rules applicable to contracting authorities in the Procurement Reform (Scotland) Act 2014.

### **Gender Representation on Public Boards (Scotland) Act 2018**

110. Paragraph 8 of schedule 2 adds Consumer Scotland to the list of bodies in schedule 1 of the Gender Representation on Public Boards (Scotland) Act 2018 (“the 2018 Act”).
111. This means that in appointing members to Consumer Scotland, the Scottish Ministers must ordinarily give preference to a woman if there are equally qualified candidates – one who is a woman and one who is not – where appointing a woman would result in, or be a step towards, 50% of the body’s membership being women (see section 4 of the 2018 Act).
112. In addition, the 2018 Act requires that steps be taken to encourage women to apply to be members of Consumer Scotland (see section 5 of the 2018 Act), and further steps to be taken to promote gender balance in the membership if the 50% target has not been reached by particular dates (see section 6 of the 2018 Act).

### **Islands (Scotland) Act 2018**

113. Paragraph 9 of schedule 2 adds Consumer Scotland to the list of relevant authorities in the schedule of the Islands (Scotland) Act 2018.
114. This means that Consumer Scotland must have regard to island communities in carrying out its functions (see section 7(1) of the Islands (Scotland) Act 2018).